Supreme Court, U. S.
FILED
MAR 13 1976
MICHAEL RODAK, JR., CLERK

No. 75-1203

In the

Supreme Court of the United States

OCTOBER TERM, 1975

EVELYN FITZGERALD, BRUCE FITZGERALD, DEBRA GREENER, MICHAEL GREENER, GAIL ATHA, BARBARA STAFFELD, CHARLES STAFFELD, DIANA ARNETT, CHARLES ARNETT, PAULETTE THOMAS, THOMAS THOMAS, HENRY FARAG, DONNA FARAG, SUSAN CHUBBS, BRUCE CHUBBS; and on behalf of all other persons similarly situated,

Petitioners,

vs.

PORTER MEMORIAL HOSPITAL; ARTHUR S. MALASTO, in his capacity as Administrator of Porter Memorial Hospital; and MAURICE MASON, JAMES W. CHESTER, WARREN H. CANRIGHT, and JAMES J. CRANDALL, individually and in their capacities as members of the Board of Trustees of Porter Memorial Hospital,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL M. SCHUYLER
100 W. Monroe Street
Chicago, Illinois 60603
Attorney for Respondents

Of Counsel:

ROGER K. CLAUDON
114 East Lincolnway
Valparaiso, Indiana 46383

JAMES P. TUTHILL
100 W. Monroe Street
Chicago, Illinois 60603

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

CONSTITUTIONAL PROVISIONS INVOLVED 1-2

QUESTIONS PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 2-3

SUMMARY OF ARGUMENT 3-5

ARGUMENT 6-23

I. Since The Prevailing Party May Ordinarily Assert In A Reviewing Court Any Ground In Support Of His Judgment, Petitioners' Position Presupposes The Existence Of A Constitutional Question The Answer To Which Would Be Made Clearer By An Evidentiary Hearing 6-9

II. No Grave Constitutional Issue Is Presented Since Petitioners Seek To Convert A Privilege Into A Right 10-20

1. Differences of opinion within the medical profession concerning the La Maze psychoprophylactic method of childbirth indicate that petitioners seek to convert a privilege into a constitutional right 10-13

2. There is no decision of this Court concerning privacy or liberty which indicates that this case involves a grave constitutional question. Indeed, this Court's decision in *Roe* v. *Wade* supports the opposite view 13-16

3. Since the petitioners seek to convert a privilege into a constitutional right, i.e., to create a new constitutional right, the consequences of the step which, realistically speaking, the petitioners are asking this Court to take must be carefully weighed 16-20

III. An Evidentiary Hearing Would Serve No Useful Purpose 20-22

CONCLUSION 22-23

PAGE

Table Of Authorities

Cases

Borden's Farm Products Co., Inc. v. *Baldwin*, 293 U.S. 194 (1934) 9

Cleveland Board of Education v. *LaFleur*, 414 U.S. 632 (1974) 14

Dandridge v. *Williams*, 397 U.S. 471 (1970) 6

Doe et al. v. *Bolton*, 410 U.S. 179 (1973) 14, 15

Duffield v. *Memorial Hospital Ass'n. of Charleston*, 361 F.Supp. 398 (S.D. W.Va. 1973) 22

Eisenstadt v. *Baird*, 405 U.S. 438 (1972) 14, 15, 19

Glona v. *American Guarantee & Liability Insurance*, 391 U.S. 73 (1968) 19

Griswold v. *Connecticut*, 381 U.S. 479 (1965) 14, 15, 17

Hammond v. *Schappi Bus Line, Inc.*, 275 U.S. 164 (1927) 9

Helvering v. *Gowran*, 302 U.S. 238 (1937) 6

Hormel v. *Helvering*, 312 U.S. 552 (1941) 8

Hulit v. *St. Vincent's Hospital*, 520 P.2d 99 (Mont. 1974) 7

Irvine v. *California*, 347 U.S. 128 (1954) 17

King v. *Saddleback Junior District*, 445 F.2d 932 (9th Cir. 1971), *cert.* denied 404 U.S. 979 (1971) 18

Lo in v. *Mississippi River Corp.*, 386 U.S. 162 (1967) .. 8

Loving v. *Virginia*, 388 U.S. 1 (1967) 14

Meyer v. *Nebraska*, 262 U.S. 390 (1923) 13

Miller v. *School District Number 167*, 495 F.2d 658 (7th Cir. 1974) 12, 18

Palko v. *Connecticut*, 302 U.S. 319 (1937) 13

Paris Adult Theatre I v. *Slaton*, 413 U.S. 49 (1973) ..13, 19

PAGE

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 14

Ploof v. *Brooks*, 342 F.Supp. 999 (D. Vt. 1972) 22

Poe v. *Ullman*, 367 U.S. 497 (1961) 17

J. E. Riley Investment Co. v. *Commissioner*, 311 U.S. 55 (1940) 6

Rochin v. *California*, 342 U.S. 165 (1952) 17

Roe v. *Ferguson*, 515 F.2d 279 (6th Cir. 1975) 8

Roe v. *Wade*, 410 U.S. 113 (1973) 13, 14, 15, 16

Roth v. *United States*, 354 U.S. 476 (1957) 19

Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 14

Sosa v. *Board of Managers of Val Verde Memorial Hospital*, 437 F.2d 173 (5th Cir. 1971) 22

Stanley v. *Georgia*, 394 U.S. 557 (1969) 14

Stanley v. *Illinois*, 405 U.S. 645 (1972) 14, 19

Turner v. *City of Memphis*, 369 U.S. 350 (1962) 8

Williams v. *Robinson*, 432 F.2d 637 (D.C. Cir. 1970) .. 22

Woodbury v. *McKinnon*, 447 F.2d 839 (5th Cir. 1971) .. 22

Wulff v. *Singleton*, 508 F.2d 1211 (8th Cir. 1975), *cert.* granted, 95 S.Ct. 2655 (1975) 8

Books

E. Bing, Six Practical Lessons for an Easier Childbirth 14-15 (1967) 21

I. Cooper, M.D., Involuntary Movement Disorders 363-64, 368 (1969) 19

R. Dripps, M.D. and J. Eckenhoff, M.D., Introduction To Anesthesia 238, 241 (4th ed., 1972) 19

PAGE

ARTICLES

Husbands in the Delivery Room: Recommendations to Hospital Administrators and Physicians on the Desirability and Safety of the Practice 10

T. Kallos, M.D. and T. Smith, M.D., *Continuous Spinal Anesthesia with Hypobaric Tetracine for Hip Surgery in Lateral Decubitis,* 51 ANESTHESIA AND ANALGESIA 166 (1972) 19

G. Leaverton, M.D. and W. Garnjobst, M.D., *Comparison of Morbidity after Spinal and Local Anesthesia in Inguinal Hernia Repair,* 38 AMERICAN SURGEON 591 (1972) 20

J. Miller, M.D., *Fathers in the Delivery Room* 11

J. Morton, M.D., *Fathers in the Delivery Room—an opposition standpoint,* HOSPITAL TOPICS (Jan. 1966) 103 11

S. Olds and L. Witt, *New Ban in the Delivery Room —the Father,* TODAY'S HEALTH (Oct. 1970) 52 12

A. Penfield, M.D., *Laparoscopic Sterilization under Local Anesthesia,* 119(2) AM. JOUR. OF OBSTETRICS AND GYNECOLOGY 733, 734, 735 (1974) 20

M. Ravin, M.D., *Comparison of Spinal and General Anesthesia for Lower Abdominal Surgery in Patients with Chronic Obstructive Pulmonary Disease,* 35 ANESTHESIOLOGY 319 (1971) 20

N. Sehgal, M.D., *The Potential for Problems when Husbands are in the Delivery Room,* RESIDENT AND STAFF PHYSICIAN (March 1973) 33 12

C. Shu, M.B., Ch. B, *Husband-Father in Delivery Room,* HOSPITALS, J.A.H.A. (Sept. 17, 1973) 90 13

NOTE

Note, 84 HARV. L. REV. 1702 (1971) 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1203

EVELYN FITZGERALD, BRUCE FITZGERALD, DEBRA GREENER, MICHAEL GREENER, GAIL ATHA, BARBARA STAFFELD, CHARLES STAFFELD, DIANA ARNETT, CHARLES ARNETT, PAULETTE THOMAS, THOMAS THOMAS, HENRY FARAG, DONNA FARAG, SUSAN CHUBBS, BRUCE CHUBBS; and on behalf of all other persons similarly situated,

Petitioners,

vs.

PORTER MEMORIAL HOSPITAL; ARTHUR S. MALASTO, in his capacity as Administrator of Porter Memorial Hospital; and MAURICE MASON, JAMES W. CHESTER, WARREN H. CANRIGHT, and JAMES J. CRANDALL, individually and in their capacities as members of the Board of Trustees of Porter Memorial Hospital,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL PROVISIONS INVOLVED

The Petition for Writ of Certiorari (the "Petition") states under this heading at p. 3 that "the limited question presented for review is essentially one of procedure rather than substance." However, examination of the Petition

reveals that petitioners' contention that the Court of Appeals erred in deciding this case without remanding for an evidentiary hearing depends upon the validity of two substantive propositions, i.e., (1) that this case involves a constitutional question of "grave importance" (Petition, pp. 3, 6, 10, 11, 15, 18); and (2) that the answer to the constitutional question would be made clearer by the production of evidence (Petition, pp. 5, 7, 9, 10, 12, 14, 15, 18). Thus the real questions here presented are not, as petitioners state, essentially procedural rather than substantive. The questions, as we see them, are set forth immediately below.

QUESTIONS PRESENTED FOR REVIEW

The basic questions presented for review are:

1. Does the complaint (R. 1) raise a constitutional issue of grave importance by asserting that a pregnant woman and her husband have a "fundamental" right, within the meaning of the United States Constitution, to insist upon the husband's presence in the delivery room when the woman's baby is delivered?

2. Assuming, *arguendo*, that a constitutional question is presented, would the answer be made clearer by an evidentiary hearing?

STATEMENT OF THE CASE

A. Nature of the case

We accept petitioners' statement of the nature of the case except for its assumption that "rights secured to them by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution" have been violated by the policy of the respondent Porter Memorial Hospital (the "Hospital").

B. Statement of facts

Petitioners' "Statement of the Facts" fails to disclose that petitioners concede that the "right" which they assert depends upon the consent of the attending physician. (Opinion below, Petition, A-7).

Petitioners also refer to evidence which they are prepared to offer. As we show later in this Brief, the Record in this case (which both petitioners and respondents have requested be transmitted to the clerk of this Court) clearly demonstrates that such evidence would add nothing to the materials which were before the District Court and the Court of Appeals. The Record further shows (summary of proceedings) that on August 20, 1974 petitioners presented evidence in support of their motion for a temporary restraining order.

SUMMARY OF ARGUMENT

In this case the petitioners challenge the constitutionality of a rule of the respondent Hospital which prohibits the presence of non-medical personnel in its delivery rooms. The petitioners urged in the trial court and in the Court of Appeals that a husband and wife, with the consent of the attending physician, have a fundamental constitutional right to have the husband present in the delivery room when the wife's baby is delivered. The trial court, after a hearing, dismissed the complaint on the ground that the petitioners lacked standing. On appeal the respondents conceded petitioners' standing to sue but argued that no fundamental right such as that insisted upon by petitioners exists. The Court of Appeals agreed and decided the case on its merits. Petitioners now contend that the case should have been remanded to the trial court for an evidentiary hearing. Petitioners say

that their Petition for Writ of Certiorari is confined to a narrow procedural issue, i.e., whether the Court of Appeals acted properly in passing upon a constitutional question not decided by the trial court.

Since the prevailing party may ordinarily assert in a reviewing court any ground in support of his judgment, it is the position of the respondents that the Court of Appeals acted with complete propriety. Even though the trial court disposed of the case on the ground that petitioners lacked standing, its decision should stand if dismissal was proper for any reason. Petitioners seek to circumvent this well-accepted rule by urging that a court of review should not ordinarily pass upon matters not presented to, considered or decided by the trial court. Here, however, the alleged constitutional question was, as we demonstrate in Points I and II, 1, *infra*, fully presented to the trial court. Moreover, the "rule" invoked by the petitioners is subject to the salutary exception which allows courts of review to do what ought to be done in the interests of effective judicial administration and judicial economy.

Petitioners also urge that a Court of Appeals should not pass upon a "grave constitutional question" when the answer to the question would be made clearer by an evidentiary hearing. It is here that petitioners' position goes beyond the bounds of raising a purely procedural question, for, in order to prevail on this point, petitioners must show (1) the existence of a grave constitutional question, and (2) that evidence would indeed make the answer clearer. Respondents urge that no grave constitutional question is presented because (1) petitioners seek to elevate a mere privilege, concerning which there is clearly and admittedly sharp disagreement within the

medical profession, to the status of a "fundamental right," (2) there is no decision of this Court which indicates the existence of a grave constitutional question, and (3) serious consequences, which must be considered in creating new fundamental rights, would ensue from a holding that the presence of a husband in the delivery room when his wife's baby is delivered is a right entitled to constitutional protection. Finally, respondents urge that the materials which were before the trial court and the Court of Appeals afford an ample basis for the decision of the Court of Appeals that petitioners do not assert a constitutional right. As a consequence, an evidentiary hearing would serve no useful purpose and would indeed result in the respondent Hospital's incurring needless additional legal expense at a time when the cost of medical care is a matter of serious national concern.

ARGUMENT

I. SINCE THE PREVAILING PARTY MAY ORDINARILY ASSERT IN A REVIEWING COURT ANY GROUND IN SUPPORT OF HIS JUDGMENT, PETITIONERS' POSITION PRESUPPOSES THE EXISTENCE OF A CONSTITUTIONAL QUESTION THE ANSWER TO WHICH WOULD BE MADE CLEARER BY AN EVIDENTIARY HEARING.

In *Dandridge* v. *Williams,* 397 U.S. 471 (1970), the validity of a regulation of the State of Maryland relating to the administration of an aspect of its public welfare program was challenged. A three-judge District Court had concluded that the regulation violated the federal Social Security Act of 1935 as well as the Fourteenth Amendment. Later the District Court revised its opinion and rested its determination that the regulation was invalid entirely on the constitutional ground. This Court found the regulation valid, but felt bound to consider both the statutory and constitutional issues, pointing out that, "The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, *whether or not that ground was relied upon or even considered by the trial court.*" (*Id.* at 475, note 6. Emphasis supplied). This statement is in full accord with the rule that in the review of judicial proceedings, if the decision below is correct, it must be affirmed even though the lower court relied upon a wrong ground or gave a wrong reason. *Helvering* v. *Gowran,* 302 U.S. 238, 245 (1937); *J. E. Riley Investment Co.* v. *Commissioner,* 311 U.S. 55, 59 (1940).

Petitioners seek to avert the impact of cases such as those cited in the preceding paragraph by reliance upon

others which take the position that an appellate court will not ordinarily consider a question of law or fact which was not *presented to,* considered, or decided by the trial court. Those cases have no bearing here not only because effective judicial administration and judicial economy frequently require an exception to the "rule" which they lay down, but also because the alleged constitutional issue which petitioners say should not have been decided by the Court of Appeals was fully presented and argued in the trial court.

That the question of petitioners' "right" to have the husband petitioners present in the delivery room when their children were born was fully presented to the trial court is amply demonstrated by the following documents which are a part of the record in the trial court: (1) Brief of Amicus Curiae, Paul R. Baier, Pro Se, Expressing the Views of the International Childbirth Education Association, as submitted in *Hulit* v. *St. Vincent's Hospital,* Supreme Court of the State of Montana, No. 12414 [520 P.2d 99 (Mont. 1974)], pp. 75-87 (R. 10); (2) Defendants' Brief in Opposition to Issuance of Temporary Restraining Order—Constitutional Issues, pp. 3-6 (R. 13); (3) Supplemental Brief in Support of Plaintiffs' Motion for Temporary Restraining Order, pp. 8-11 (R. 19); (4) Plaintiffs' Supplemental Brief in Support of Motion for Temporary Restraining Order, pp. 1-4 (R. 21). And in their Brief in Support of Plaintiffs' Motion for Temporary Restraining Order, p. 1 (R. 18), petitioners advised the trial court that *"The sole issue* before the court is whether the defendants' rule excluding all fathers from the hospital delivery room . . . is a constitutionally permissible restriction on plaintiffs' *fundamental privacy rights* . . ." (Emphasis supplied).

Even if it were not abundantly clear from the foregoing references that the alleged constitutional issue was presented to the trial court, many of the cases relied upon by the petitioners are not pertinent here. They merely reiterate the well-settled principle that a reviewing court should not ordinarily consider issues not raised below. That principle, however, is subject to the equally well-settled exception, which is recognized by petitioners (Petition, pp. 14-15), that effective judicial administration and judicial economy dictate that the merits of a controversy be addressed at the earliest possible time. *See Turner* v. *City of Memphis,* 369 U.S. 350, 353 (1962); *Levin* v. *Mississippi River Corp.,* 386 U.S. 162, 170 (1967). This view is also supported by *Hormel* v. *Helvering,* 312 U.S. 552, 557, 558 (1941), upon which petitioners place considerable reliance. (Petition, pp. 6-7). Petitioners also rely heavily on what they perceive to be a conflict between circuits generated by *Wulff* v. *Singleton,* 508 F.2d 1211 (8th Cir. 1975), *cert.* granted, 95 S.Ct. 2655 (1975) and *Roe* v. *Ferguson,* 515 F.2d 279 (6th Cir. 1975). Those cases, however, do not involve the propriety of a decision by a Court of Appeals concerning a constitutional question with respect to which no evidentiary hearing has been held. The *Wulff* case deals with the *jurisdiction* of a Court of Appeals to pass upon the constitutionality of a statute *on an appeal from a three judge court* convened pursuant to 28 U.S.C. §§2281 and 2284. (Petition for Certiorari in the *Wulff* case, pp. 10-14). The *Ferguson* case deals with the *jurisdiction* of the Court of Appeals to decide a constitutional question, not decided below, which the court felt was required by statute to be passed upon by a three-judge district court. No such jurisdictional problem exists in this case and, for this reason, whatever conflict may exist between the *Wulff* and *Ferguson* cases should not be allowed to obfuscate the issue here.

In view of the foregoing, petitioners are left with the argument that such cases as *Hammond* v. *Schappi Bus Line, Inc.,* 275 U.S. 164 (1927) and *Borden's Farm Products Co., Inc.,* v. *Baldwin,* 293 U.S. 194 (1934), support their contention that an evidentiary hearing is needed here. In both of those cases, however, this Court found that constitutional questions "both of novel and of far reaching importance" were presented. (275 U.S. at 171; 293 U.S. at 212). Moreover, in the *Schappi* case, this Court outlined a host of questions (275 U.S. at 170-71) which it felt could not be answered without factual enlightenment. And in the *Borden* case this Court was concerned with the constitutionality of a New York statute authorizing a control board to establish a differential of one cent per quart of milk in favor of dealers not having a "well advertised trade name." Obviously the validity of the apparently discriminatory provisions of the statute would depend upon the presentation of complex economic and market data which would require an evidentiary hearing.

From the *Schappi* and *Borden* cases the conclusion may be drawn, as the matter is put in the concurring opinion of Justices Stone and Cardozo in the *Borden* case, that "it is inexpedient to determine grave constitutional questions upon a demurrer . . . or upon an equivalent motion, if there is a reasonable likelihood that the producton of evidence will make the answer to the question clearer." (293 U.S. at 213). As we believe we have demonstrated, that statement constitutes the legal essence of petitioners' argument. The argument, however, must obviously fail unless (1) a grave constitutional question is present here and (2) the answer to that question will be made clearer by the production of evidence. For reasons which we shall now discuss, it is clear that petitioners have met neither test.

II. NO GRAVE CONSTITUTIONAL ISSUE IS PRESENTED SINCE PETITIONERS SEEK TO CONVERT A PRIVILEGE INTO A RIGHT.

1. Differences of opinion within the medical profession concerning the Lamaze psychoprophylactic method of childbirth indicate that petitioners seek to convert a privilege into a constitutional right.

Petitioners state that they "are prepared to offer evidence to prove . . . that the presence of husbands in the hospital delivery room is a well-accepted medical practice." (Petition, p. 5). Petitioners also offer to produce evidence to prove "that the psycho-prophylactic (or prepared) childbirth methods with the lack of or lesser amounts of anaesthesia are safe and desirable for both mother and baby." (*Id.*) We do not question that petitioners could produce testimony in support of both of these points. That does not mean, however, that permitting fathers to be present in the delivery room is, in the general opinion of the medical profession, a desirable practice from a medical point of view. In the first place, petitioners concede that the attending physician's consent is an absolute prerequisite to allowing the husband to be present at the birth of his child. (Opinion below, Petition A-7). Secondly, and perhaps more importantly, there is serious disagreement within the medical profession concerning the practice which the petitioners espouse. This is demonstrated not only by materials relied upon by the petitioners in the trial court but also by other discussions of the subject.

In the publication, *Husbands in the Delivery Room: Recommendations to Hospital Administrators and Physicians on the Desirability and Safety of the Practice*, attached the trial court Brief in Support of Plaintiffs' Motion for Temporary Restraining Order (R. 18), it is

stated at p. iii that "the first step toward . . . allowing women to share the experience of birth with their husbands *has yet to be taken in many hospitals throughout the country.*" (Emphasis supplied). The same publication refers at p. iv to husband participation in childbirth as "*(o)ne of the most controversial aspects* of Family Centered Maternity Care" (emphasis supplied), and states at p. 12 that of 407 responses to an American College of Obstetrics and Gynecology survey in California, 275 members stated that they would not like to admit the patient's husband to the delivery room. And in the other article cited by petitioners (J. Miller, M.D., *Fathers in the Delivery Room*), the author, though favoring petitioners' view, states that Dr. Allan Barnes (then editor of the American Journal of Obstetrics and Gynecology), in opposing a husband's presence in the delivery room, "*speaks for the great majority* of doctors and hospital administrators." (Emphasis supplied).

Other articles, not referred to by the petitioners, fortify the conclusion that petitioners seek judicial elevation, to the status of a constitutional right, of a privilege still the subject of widely divergent views within the medical profession. Thus, an Associate Clinical Professor of Obstetrics and Gynecology at Loma Linda (California) University has stated that, "We feel that for the best interests of the patient . . . visitors to the delivery room [should] be barred by formal statement in the by-laws of the hospital and its staff." J. Morton, M.D., *Fathers in the Delivery Room—an opposition standpoint,* HOSPITAL TOPICS (Jan. 1966) 103, 104. Divergent views are also described in an article of which the subtitle is "The debate grows—on the one side fathers and physicians who declare Dad's rightful place is in the delivery room. On the other side, fathers and physicians who say childbirth is not for sharing."

S. Olds and L. Witt, *New Man in the Delivery Room—the Father,* TODAY'S HEALTH (Oct. 1970) 52. The same article quotes Robert Morris, M.D., Associate Director of Obstetrics, New York University Hospital, as saying that, "At an important time like this [birth], the medical personnel should be distracted as little as possible from their essential tasks." (*Id.* at 54). And the Assistant Director, Department of Obstetrics and Gynecology, Sacramento Medical Center, California, who approves of the pregnant woman's husband's or mother's presence in the labor room, but strongly objects to carrying this into the delivery room, concludes that, "it should be remembered that the quality of obstetrical care depends on the professional ability of the obstetrician, and not whether the husband is or is not allowed to stay in the delivery room and watch the whole procedure." N. Sehgal, M.D., *The Potential for Problems when Husbands are in the Delivery Room,* RESIDENT AND STAFF PHYSICIAN (March 1973) 33, 35.

The foregoing articles are quoted, not with a view to establishing the undesirability of permitting husbands to be with their wives in hospital delivery rooms, but to show that the petitioners are asking for judicial declaration of the existence of a *fundamental constitutional right* in an area which clearly falls within the expertise of the medical profession and with respect to which physicians' opinions vary widely. In view of this divergence of medical opinion concerning the father-coach method of delivery, we suggest that the petitioners are not seeking to vindicate what has been referred to as a "constitutional interest of first magnitude."* What they are really seeking

* *See Miller* v. *School District Number 167,* 495 F. 2d 658, 668 (7th Cir. 1974) (school board's termination of employment of teacher who wore beard and sideburns *held* not a deprivation forbidden by the constitution).

is judicial protection of a privilege. *See* C. Shu, M.B., Ch. B, *Husband-Father in Delivery Room? (Obstetricians hold divergent views about permitting a husband-father to witness the birth of his child),* HOSPITALS, J.A.H.A. (Sept. 17, 1973) 90, 94: "It must be clearly understood that the presence of the husband-father in the delivery room *is a privilege to be granted and not a right to be demanded.*" (Emphasis supplied).

2. There is no decision of this Court concerning privacy or liberty which indicates that this case involves a grave constitutional question. Indeed, this Court's decision in Roe v. Wade supports the opposite view.

In *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 65 (1973), which held that a Georgia statute prohibiting the distribution of obscene materials was constitutional, this Court said:

> Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" *Palko* v. *Connecticut,* 302 U.S. 319, 325 (1937). *Roe* v. *Wade,* 410 U.S. 113, 152 (1973). This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing.

The decisions of this Court which may be regarded as supporting in a general way the statement contained in the second sentence of the above quotation are cited and briefly described in the footnote.* Since the "right" to

* *Meyer* v. *Nebraska,* 262 U. S. 390 (1923) (statute prohibiting teaching of any modern language to any child who had not passed eighth grade *held* contrary to the concept of liberty which denotes the right of an individual "to marry, establish a home and bring up children

insist on the presence of a husband in the delivery room has never been before this Court, it is obvious that none of the cases cited in the footnote is directly in point. Some are not only not directly in point but also have only a remote bearing on the petitioners' claim in this case and therefore do not require comment. We shall, however, briefly discuss the four cases which appear to have a some-

---

• (Continued)

. . ." *Id.* at 399); *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925) (statute requiring children between eight and sixteen to attend public schools "unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of children . . ." *Id.* at 534-35); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942) (compulsory sterilization statute *held* void. "Marriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541); *Griswold* v. *Connecticut,* 381 U. S. 479 (1965) (statute forbidding use of contraceptives *held* invalid); *Loving* v. *Virginia,* 388 U. S. 1 (1967) (statute prohibiting marriages between white and black people *held* invalid. *Skinner* v. *Oklahoma* quoted with approval); *Stanley* v. *Georgia,* 394 U. S. 557 (1969) (state may not prohibit possession of obscene materials, because under the First Amendment, "the State has no business telling a man sitting alone in his own house, what books he may read, or what films he may watch." *Id.* at 565); *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972) (ban on sale of contraceptives to unmarried individuals impinges on the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as to the decision whether to bear or beget a child." *Id.* at 453); *Stanley* v. *Illinois,* 405 U. S. 645 (1972) (unwed father *held* entitled to hearing on fitness as a parent before being deprived of his children, quoting *Skinner* v. *Oklahoma*); *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe et al.* v. *Bolton,* 410 U. S. 179 (1973) (right to abortion during first trimester of pregnancy); *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632 (1974) (school board rule requiring pregnant teacher to take unpaid maternity leave at specified time before birth of child *held* an intrusion upon teachers' decisions whether to bear or beget children. *Id.* at 650).

what closer relationship to this case. Even these fall far short of supporting petitioners' position and we believe that *Roe* v. *Wade,* 410 U.S. 113 (1973), strongly supports ours.

Griswold v. *Connecticut,* 381 U.S. 479 (1965), clearly recognizes the right of privacy inherent in the marriage relationship and may be said to place on a constitutional plane the sanctity of the home, attempts to regulate marital intimacies and intrusions on the determination of whether or not to have children. None of those elements is present here.

Eisenstadt v. *Baird,* 405 U.S. 438 (1972), likewise places within the protection of the right of privacy "the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to *bear or beget* a child." (*Id.* at 453. Emphasis partially supplied). That is not involved here.

The individual's right of decision as to bearing and begetting children was enlarged in *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe et al.* v. *Bolton,* 410 U.S. 179 (1973). In those cases, this Court recognized that a pregnant woman, at least with the concurrence of her physician, has a constitutional right, which cannot be restricted by state law, to decide to terminate her pregnancy during the first trimester. In reaching this conclusion, this Court, in *Roe* v. *Wade,* 410 U.S. 113, 153 (1973), placed considerable stress on the "detriment that the State would impose upon the pregnant woman by denying this choice altogether . . .," *i.e.,* direct harm medically diagnosable, a distressful life and future for the woman, psychological harm, the tax that child care may impose on mental and physical health, the distress for all concerned associated with an

unwanted child, the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it, and in some cases the stigma of unwed motherhood. Those reasons cannot be advanced in support of petitioners' demand for recognition of the presence of fathers in the delivery room as a constitutional right. That choice involves only a method of birth and not the effects of birth itself.

We believe that the foregoing discussion substantiates our earlier assertion that the cases fall far short of establishing the right claimed by the plaintiffs. Our position that no such right exists in fact finds strong affirmative support in *Roe* v. *Wade*. For this Court there held that a woman's right to decide whether or not to bear a child is not unrestricted after the first trimester of pregnancy. And after viability is established, the state and its public hospitals plainly have a legitimate interest in attempting to assure the health and safety of both mother and baby in the process of childbirth. If, when the point of viability is reached, mother and child are of appropriate concern to the states in an abortion case, then surely their health and safety are matters of even more compelling interest at the moment of birth.

3. Since the petitioners seek to convert a privilege into a constitutional right, i.e., to create a new constitutional right, the consequences of the step which, realistically speaking, the petitioners are asking this Court to take must be carefully weighed.

We believe that we have shown in Points II, 1 and 2, *supra*, that the petitioners are trying to convert a privilege into a right and that there is no decision of this Court which justifies petitioners' position here. In other words, the petitioners are asking this Court to declare the exist-

ence of a new fundamental constitutional right—a step which should be carefully weighed in terms of the existing rubric of the law and also in terms of possible consequences. As was wisely stated by Mr. Justice Harlan, dissenting in *Poe* v. *Ullman*, 367 U. S. 497, 544-45 (1961):

> Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no "mechanical yardstick," no "mechanical answer." *The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further* [*cut*] *a channel for what is to come." Irvine* v. *California*, 347 U. S. 128, 147 (dissenting opinion). The matter was well put in *Rochin* v. *California*, 342 U. S. 165, 170-171:
>
> > "The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession." (Emphasis supplied).

Later, discussing the same problem in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), Mr. Justice Goldberg, in a concurring opinion, put the matter thus (*id.* at 493):

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look

> to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] as to be ranked as fundamental." . . . The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'. . . ."

In this case, we deal with a "new claim to Constitutional protection," and this Court, despite petitioners' assertion that only a procedural question is before it, is asked to make a new decision which must take its place in relation to the past and take account of its future consequences. The result must not be allowed to depend on "personal and private notions." Yet, considering the divergence of opinion within the medical profession as to the merits of the psychoprophylactic method of childbirth (*see* Point II, i, *supra*), that would be the consequence of recognition of the petitioners' claim. For, realistically speaking, the petitioners seek an assessment by this Court of problems falling without the spheres of the special competence of the judiciary. *See Miller* v. *School District Number 167*, 495 F.2d 658, 668, note 35 (7th Cir. 1974). In that respect this case is vastly different from those involving contraception and abortion, because the effects of those processes are clear and distinct as contrasted with the speculative advantages said by some to flow from a father's presence at the birth of his child. True, the difference is one of degree, but it is so substantial that in cases of this kind, as in those involving modes of dress,* results are bound to

* *See* the very large number of cases involving hair style collected in *King* v. *Saddleback Junior District*, 445 F.2d 932, 936 (9th Cir. 1971), *cert. denied*, 404 U. S. 979 (1971), and in Note, 84 Harv. L.Rev. 1702, 1703, note 4 (1971).

depend far too heavily on "personal and private notions." A sounder basis for judgment is needed.

Beyond the need for a more solid foundation for judgment is the need that any new right cut a rational "channel for what is to come." Of course every consequence of a new right cannot be anticipated,** but surely the problems which hospitals all over the country may encounter if the petitioners prevail here are legitimate considerations of this Court. One result is almost certain. If husbands are to be allowed in the delivery room, the decisions in *Glona* v. *American Guarantee & Liability Insurance*, 391 U. S. 73, 75-76 (1968), *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972) and *Stanley* v. *Illinois*, 405 U. S. 645, 652 (1972) will offer an intriguing basis for the assertion of a similar right by unwed fathers. Of more serious import is the strong likelihood that judicial intervention here will encourage other attempts to impinge, in similar and other ways, upon the autonomy of hospitals in connection with other medical procedures.* Hospitals, of course, do not

* In this connection, *see* the comments of Mr. Justice Brennan, dissenting in *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 82-83 (1973), where he describes the results of the Court's earlier decision in *Roth* v. *United States*, 354 U. S. 476 (1957).

** This problem is recognized in the opinion of the Court of Appeals: "Indeed, any patient about to undergo serious surgery might also assert a constitutionally protected interest in the companionship of his choice during the time of stress, or, indeed, in the surgical procedure of his choice." (Petition, A-6, note 16). That the problem is not imagined is attested by the fact that in numerous surgical procedures the patient is awake throughout. I. Cooper, M.D., Involuntary Movement Disorders 363-64, 368 (1969) (brain surgery); R. Dripps, M.D. and J. Eckenhoff, M.D., Introduction to Anesthesia 238, 241 (4th ed. 1972); T. Kallos, M.D. and T. Smith, M.D., *Continuous Spinal Anes-*

have a fundamental "right to be let alone" under any and all circumstances. We suggest, however, that the technical aspects of a hospital's operations should be immune from judicial interference except in rare instances, *e. g.*, when a clear violation of a fundamental right has been established or when patient care has suffered or is threatened by some act or omission of the hospital. That has not happened here.

III. AN EVIDENTIARY HEARING WOULD SERVE NO USEFUL PURPOSE.

Petitioners assert that "there exists a genuine dispute as to the underlying facts which must first be settled by the trial court. . . ." (Petition, p. 12). They also suggest (1) that "the introduction of evidence would be helpful to clarify the issues . . ." (*id.*, p. 14), (2) that a "resolution of the dispute as to the underlying facts" by the trial court is essential to the proper determination of the grave constitutional issue which they say exists (*id.*, p. 15), and (3) that "there exists a genuine dispute as to the material facts." (*Id.*, p. 18). Nowhere in the Petition, however, is the nature of the alleged factual dispute disclosed. For even if all of the evidence which petitioners say they

•• (Continued)
thesia with Hypobaric Tetracaine for Hip Surgery in Lateral Decubitus, 51 ANESTHESIA AND ANALGESIA 766 (1972); G. Leaverton, M.D. and W. Garnjobst, M.D., *Comparison of Morbidity after Spinal and Local Anesthesia in Inguinal Hernia Repair,* 38 AMERICAN SURGEON 591 (1972); A. Penfield, M.D., *Laparoscopic Sterilization under Local Anesthesia,* 119(2) AM. JOUR. OF OBSTETRICS AND GYNECOLOGY 733, 734, 735 (1974); M. Ravin, M.D., *Comparison of Spinal and General Anesthesia for Lower Abdominal Surgery in Patients with Chronic Obstructive Pulmonary Disease,* 35 ANESTHESIOLOGY 319 (1971).

would introduce (Petition, pp. 5, 11) were received, the fact remains that there exists a bona fide difference of opinion among physicians concerning the presence of fathers in the delivery room.

That there are within the medical profession divergent views concerning the Lamaze psychoprophylactic method of childbirth is not surprising because it is a method of recent vintage.• The Court of Appeals clearly recognized the existence of divergent medical opinions as did petitioners in that Court. The evidence which petitioners say should be presented, considered in the light of literature cited not only by us but also by the petitioners themselves (*see* Point II, 1, *supra*), clearly suggests that an evidentiary hearing would involve a parade of experts for both parties who would express divergent opinions. To decide without such a hearing, as the Court of Appeals did, that the presence of fathers in the delivery room does not involve a fundamental constitutional right is not to bow "to the expertise of the medical profession without the benefit of an evidentiary hearing." Rather, it is to recognize, as the opinion below does (Petition, A-7, A-8, note 22), that there is a strong disagreement among physicians concerning a privilege which falls without the spheres of the special competence of the judiciary. Although the time may come when competent physicians no longer disagree, it is respectfully suggested that, unless and until it does, hospital governing bodies should be left free to follow the recommendations of their own medical staffs concern-

• The Lamaze method was first observed in Russia in 1951 by Dr. Fernand Lamaze, who introduced it in France and elsewhere. It seems first to have been noticed in this country in 1959. E. BING, SIX PRACTICAL LESSONS FOR AN EASIER CHILDBIRTH 74-75 (1967).

ing the propriety of allowing non-medical personnel in the delivery room.* That is what the respondent Hospital did here.**

CONCLUSION

We believe that we have established that the Petition should be denied in the absence of a showing by petitioners that they have presented a grave constitutional question which can be better answered following an evidentiary hearing. Petitioners have not demonstrated even the potential existence of a fundamental constitutional right. Rather have they sought to elevate a privilege to the dignity of a new and heretofore unknown right with respect to a medical procedure concerning the merits of which a substantial divergence of opinion exists within the medical profession. In so doing, petitioners take no account of the new demands relating to other medical procedures which judicial recognition of a father's presence in the delivery room as a "right" could engender. Nor do petitioners take account of the financial outlays to which such recognition would put public hospitals throughout the

* As to the limited scope of judicial review of hospital actions which other courts have deemed appropriate, *see Williams* v. *Robinson*, 432 F.2d 637, 641 (D.C. Cir. 1970); *Sosa* v. *Board of Managers of Val Verde Memorial Hospital*, 437 F.2d 173, 177 (5th Cir. 1971); *Woodbury* v. *McKinnon*, 447 F.2d 839, 842-43 (5th Cir. 1971); *Ploof* v. *Brooks*, 342 F.Supp. 999, 1004 (D. Vt. 1972); *Duffield* v. *Memorial Hospital Ass'n. of Charleston*, 361 F.Supp. 398, 404 (S.D. W.Va. 1973).

** *See* the affidavit of the respondent Malasto, Administrator of the Hospital referred to in the opinion below (Petition, A-3, note 6, A-7, note 21) which sets forth some of the reasons for the Hospital's rule.

country at a time when the cost of medical care is a matter of the most serious public concern.

Apart from what has been said, even if a constitutional question existed, the materials which were before the trial court, the Court of Appeals and this Court plainly demonstrate that nothing would be gained by remanding this case to the trial court. From those materials, and even without reference to them, it is obvious that this case cannot be equated with the denial of a woman's limited right to an abortion or to her right to access to means of contraception. As the trial court aptly observed, "the hospital is not denying the patient the opportunity of having an operation, but only placing certain restrictions upon the procedure." (Petition, A-17).

On the basis of the foregoing it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DANIEL M. SCHUYLER,
100 W. Monroe Street
Chicago, Illinois 60603
Telephone: 312-726-8565
Attorney for Respondents

Of Counsel:
ROGER K. CLAUDON
114 East Lincolnway
Valparaiso, Indiana 46383

JAMES P. TUTHILL
100 W. Monroe Street
Chicago, Illinois 60603